IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8870 OF 2004

Jalpa Viren Vora .. Petitioner
Versus
Viren Rasiklal Vora .. Respondent

Ms.Iyer with Mr.K.D.Shah for petitioner
Mr.N.R.Bubna for respondent.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 24th February 2006.

P.C.

. Heard Ms.Iyer for petitioner and Mr.Bubna for respondent. Respondent husband has filed M.J.Petition No.A-1988 of 2003 in the Family Court Mumbai for dissolution of marriage by decree of divorce under section 13(1)(i-a)(iii) of Hindu Marriage Act, 1955. The marriage was solemnised on 11th February 1997 and from this wedlock a miner child Dev aged 5 and half years

is born.

2. Matrimonial petition has been contested and the written statement has been filed by petitioner.

3. It appears from the record that an interim application No.70 of 2004 in the above petition was filed, seeking custody of this minor, by petitioner wife - mother. In the application it was stated that the child who was in her custody was picked up on one day by respondent husband for being taken to some family function. The petitioner handed over the child to respondent husband on an assurance that the child would be returned to her after the said function is over. The child was not so returned and it is in these circumstances that an application is preferred seeking his custody. Events leading to the child being taken away on 23rd October 2003 for celebrating Diwali and for

buying crackers has been narrated with all dates with the attempts made to seek custody of child. Finally, an application dated 5th April 2004 was made.

4. The respondent filed a reply thereto stating therein that the application is not maintainable. A serious allegation was levelled that the petitioner is mentally incapable of taking care of minor child and his interest would be protected in case his custody is retained by respondent father. Equally serious allegation of neglect of minor child by mother has been made. The allegations and counter allegations are to be found in the application and the reply thereto.

5. Learned Judge before whom the application was placed noted the main contention of father that the petitioner is psychologically disturbed and it will not be fair, just and proper to hand over custody of the minor to her and therefore,

the application be dismissed.

6. This application is dismissed by the learned Judge by the impugned order dated 2nd September 2004 which is challenged in this petition under Article 227 of Constitution of India.

7. Para 4 of the impugned order reads thus:-

> "4. Heard learned Advocates for the parties. It is true that the child is quite young. However, at the moment, there is nothing on record to indicae that the child was snatched away from the custody of the mother as alleged by the respondent. If at all the child was snatched away or deceptively taken by the petitioner, the respondent ought to have taken immediate steps to recover custody of he child. There is also nothing to

indicate that the petitioner and his family members are unable to take care of the child being busy in their activities like business and kitty parties. There are no documents to indicate that the child does not keep good health and therefore, he needs proper attention which the petitioner and his family members are unable to give. Therefore, merely because the child is of tender age, it will not be just and proper to disturb the custody. It was stated that access was going on under the provisions of marriage counsellor in the Court premises. Till today, there is no report to indicate that the child was more attached to the mother and that he refused to go to the father after access was over or that he was no comfortable with the father."

8. A bare perusal of the above would indicate that the learned Judge has been influenced greatly by the fact that there is nothing on record to indicate that the child was snatched away from the custody of the mother. The learned Judge also seems to have been further influenced by the fact that if the child was so snatched away immediate steps to recover the custody have not been taken by natural mother of the minor. Thereafter, the learned Judge notes that the child is safe with the father and his family members. According to learned Judge, the child is not neglected and, therefore, it is not necessary to disturb the custody even if the child is of minor age.

9. Strangly and most disturbingly, the learned Judge states that a report has not ben made available to him by the Marriage Counsellor indicating that the child was more attached to mother and that he refuses to go to father after

access was over in the court premises.

10. In my view, disposal of custody application by the courts below in such a fashion is hardly satisfactory. Family Courts Act has been enacted with specific object and purpose. It sets up a Court which is not bound by specific rules of procedure but can evolve its own in the interest of fairness and justice. The family court has not been advisedly bound by law of evidence and other provisions which have to be strictly followed in any adjudication. Affidavit evidence which is normally not permissible is also permitted to be tendered in appropriate cases and in peculiar facts. The learned Judge seems to have overlooked the object and purpose for which the Family Court is set up under the Family Courts Act, 1984. The learned Judge has also overlooked the rules which have been framed by this Court and the State of Maharashtra enabling family Courts to evolve a procedure in

consonance with justice.

11. Surprisingly, the learned Judge has overlooked the fact that the custody of minor normally should be with mother. It is in exceptional circumstances that the custody is disturbed of minor child from the mother and handed over to father or other applicants. More so, when the petitioner is asserting that the minor is with her since birth. It is unfortunate that the application of mother has been disposed of by the learned Judge by overlooking the above provisions. The Hindu Marriage Act in section 26 states that the court has powers to pass such interim orders and make such provisions even in the final decree as it may deem fit and proper in respect of custody, maintainance and education of minor children consistently with their wishes wherever possible. The learned Judge does not seem to have ascertained the wishes of the child. It does not appear that he was aware of his

duties, namely, to protect interest of the minor which is paramount in all cases. He faults the mother for not approaching the court earlier. Equally, he has not the taken note of the fact that the respondent before him has not been able to substantiate that the mother is psychologically disturbed and, therefore, the custody should not be with her. In my view, the observations of Supreme Court in the case of R.V.Srinath Prasad Vs. nandamuri Jayakrishna, reported in A.I.R. 2001 S.C. 1056 should be borne in mind by the court while deciding such application. The Supreme Court in paras 9 and 11 of the said judgement has observed as under:-

> "9. Custody of minor children is a sensitive issue. It is also a matter involving sentimental attachment. Such a matter is to be approached and tackled carefully. A balance has to be struck between the attachment and sentiments of

the parties towards the minor children and the welfare of the minors which is of paramount importance.

11. The High Court appears to have over-looked the settled principle that custody orders by their nature can never be final; however, before a change is made it must be proved to be in the paramount interest of the children. In a sensitive matter like this no singl factor can be taken to the decisive. Neither affluence nor capacity to provide comfortable living should cloud the consideration by the Court. Here we may refer to the decision of this Court in Jai Prakash Khadria Vs. Shyam Sunder Agarwalla, (2000) 6 S.C.C. 598: (2000 AIR SCW 2341: AIR 2000 S.C. 2172). In such matters usually, Courts while granting the custody of minor children to

> one party extend the facility of visiting them to the other. At the cost of repetition we may state that we are not discussing the merits of the case pleaded by the parties in detail since the application for the custody is pending for adjudication before the family court at Hyderabad."

In the light of these well settled principles, the impugned order cannot be sustained. Accordingly, the same is set aside.

12. Application for custody of minor is restored to the file of family court for disposal afresh and in accordance with law by giving opportunity to both sides. The said application be disposed of within a period of six weeks from the date of appearance of parties. Parties to appear before the family court on 7th March 2006. Needless to observe that during the pendency of

this application, it would be open for the learned Judge to make such orders as are permissible in law including of interim custody of minor. All contentions in that behalf of both sides are kept open.

(S.C.DHARMADHIKARI, J)